

NO. 2013-CA-00882-SCT

IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

WILLIE JEROME MANNING,

Petitioner-Appellant,

V.

STATE OF MISSISSIPPI,

Respondent-Appellee.

On Appeal from the Circuit Court of Oktibbeha County

**BRIEF OF *AMICUS CURIAE*, PROFESSOR SAMUEL R. GROSS, IN SUPPORT
OF APPELLANT, WILLIE JEROME MANNING**

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INTEREST OF AMICUS CURIAE

Amicus **Samuel R. Gross** is the Thomas and Mabel Long Professor of Law at the University of Michigan Law School where he teaches Criminal Procedure, Evidence, and courses on wrongful convictions and the use of social science evidence in legal proceedings. Professor Gross has published many works on criminal procedure, the law of evidence, false convictions and exonerations, and eyewitness identification.

Professor Gross is the Editor and Co-Founder of the National Registry of Exonerations (“Registry”), a joint project of the University of Michigan Law School and Northwestern University. The Registry collects, studies and publishes information on all known exonerations in the United States since 1989, cases in which defendants who were convicted of crimes are later officially cleared based on new evidence of innocence. The list of cases maintained by the Registry is constantly growing as new exonerations occur and as the Registry’s researchers identify previously unknown exonerations. Summaries of those cases, together with detailed tabulations and other materials, are available on the Registry website, exonerationregistry.org. As of December 12, 2013, there were 1,260 known exonerations listed in the Registry. Fourteen of these cases come from Mississippi. Of the cases in the Registry, the overwhelming majority (898) are non-DNA exonerations. Nearly half of all exonerated defendants (572) were originally convicted of murder. The Registry has published three reports since its creation in May 2012, all co-authored by Professor Gross: two on observable trends in exonerations and on the causes of wrongful convictions, and one on witness recantations. These reports are available on the Registry web site at <https://www.law.umich.edu/special/exoneration/Pages/learnmore.aspx>.

Professor Gross has a long-standing interest in research on wrongful convictions, and in the development of the law on this issue. He has a similar long-time interest in the use of social science data in legal decision making.

Amicus Samuel R. Gross has prepared this brief to alert the Court to recent data from the Registry and other sources on wrongful conviction and exonerations, both in homicide cases in general and in death penalty cases in particular, in the hope that these data might be useful to the Court in deciding this appeal.

INTRODUCTION AND FACTUAL SUMMARY

On January 18, 1993, 90-year-old Alberta Jordan and her 60-year-old daughter, Emmoline Jimmerson, were found brutally murdered in their home in Starkville, Mississippi. They had been beaten with a tire iron and their throats had been slashed. More than 18 months later, on August 2, 1994, Willie Manning was indicted for these murders. Mr. Manning was convicted of two counts of capital murder on July 24, 1996, and sentenced to death on July 25, 1996. Since then, Mr. Manning has engaged in years of post-conviction litigation, culminating in the current appeal of the denial of his Motion for Post-Conviction Collateral Relief.

In considering this appeal, this Court must pass on Mr. Manning's claim that his conviction must be reversed because of two types of constitutional error: ineffective assistance by his defense counsel¹; and the failure of the state to disclose exculpatory evidence.² Each of these issues requires the Court to assess the prejudice that Mr. Manning may have suffered from the conduct of which he complains. This brief of *amicus curiae* is submitted in the hope that it might assist the Court in evaluating the issue of prejudice.

The facts of this case have been fully described by the parties in their briefs. *Amicus* therefore will only identify several facts that bear on the information he wishes to present to the Court for its use in considering this appeal.

¹ *Strickland v. Washington*, 466 U.S. 668 (1984).

² *Brady v. Maryland*, 373 U.S. 83 (1963); *United States v. Bagley*, 473 U.S. 667 (1985); *Kyles v. Whitley*, 514 U.S. 419 (1995).

- No physical evidence tied Mr. Manning to the scene of the crime, even though fingerprints and a bloody footprint were collected by law enforcement. *Manning v. State*, 735 So. 2d 323, 331 (Miss. 1999); PCR Order, p. 5 (May 21, 2013).
- The footprint found at the crime scene was left by a size 8 shoe; Mr. Manning wears a size 11 or 11.5 shoe. The State did not disclose this exculpatory forensic evidence to the defendant or to the trial court before trial, or to the jury that convicted Mr. Manning at his trial. PCR Order, p. 5.
- Mr. Manning was convicted based on the testimony of two witnesses:
 - Kevin Lucious testified that at the time of the murders he lived across the street from the victims, and that he saw Mr. Manning enter the victims' home near the time of the murder. He also testified that after the murder Mr. Manning made inculpatory statements to him. *Manning*, 735 So. 2d at 331.
 - Herbert Ashford testified that he overheard Mr. Manning making inculpatory statements two or three weeks after the murders. *Id.* Mr. Ashford denied receiving any favorable treatment from authorities in exchange for his testimony. PCR T. 236.
- Mr. Lucious has recanted his trial testimony. He testified at a post-conviction hearing that he was told by the District Attorney, Forrest Allgood, that he and the mother of his daughter would both be prosecuted for murder if he did not implicate Mr. Manning. PCR Order, pp. 4-6.
- Mr. Lucious' recantation has been corroborated by extensive independent evidence that at the time of the murder he did not live near the victims' house and could not have seen Mr. Manning enter that house, all contrary to his testimony at trial. *Id.*
- Canvas notes from police officers investigating these murders showed that Mr. Lucious was not living near the scene of the crime and could not have seen the events he testified to from his residence. Those notes were not disclosed to the defendant or to the court before trial, or to the jury that convicted Mr. Manning at his trial. PCR T. 213, 220.
- Mr. Ashford repeatedly contacted the police officers assisting in the Manning prosecution and offered to testify in that case while at the same time asking the officers to help obtain a reduction of the federal prison sentence Mr. Ashford was then serving. T. 433-40; Exh. 15. Mr. Ashford's federal sentence was in fact reduced three months before his testified against Mr. Manning. PCR. T. 251, 253-54; Exhs. 13, 14.

SUMMARY OF ARGUMENT

Mr. Manning's case shares several important features with many cases in which defendants were convicted of murder but later exonerated:

- Mr. Manning was sentenced to death. Exonerations are concentrated among death sentences.
- Mr. Manning was convicted of murdering two women. Murder cases with female victims are more likely to end in exoneration than those with male victims.
- The investigation of the murders for which Mr. Manning was convicted remained open for more than 18 months. Capital convictions with long, difficult investigations are more likely to produce exonerations than those with shorter investigations.
- Mr. Manning's conviction was partly based on perjury, as were the convictions of nearly three-quarters of the exonerations of defendants who were sentenced to death.
- Mr. Manning's trial was marred by official misconduct, as were the trials of the great majority of exonerated capital defendants.
- The critical witness at Mr. Manning's trial recanted his testimony. This is common among death-sentence cases that later produce exonerations, especially those that include perjury and official misconduct.

This is a disturbing pattern that the Court should take into account in weighing the possibility of prejudice, as the Court must do when it reviews Mr. Manning's legal claims.

ARGUMENT

THE INVESTIGATION AND THE TRIAL THAT LED TO MR. MANNING'S CONVICTION AND DEATH SENTENCE INCLUDED SEVERAL FACTORS THAT ARE COMMON AMONG THE MANY CASES OF DEFENDANTS WHO HAVE BEEN SENTENCED TO DEATH IN THE UNITED STATES AND LATER EXONERATED BASED ON NEW EVIDENCE OF INNOCENCE

I. The Work of the National Registry of Exonerations and Some General Findings

The National Registry of Exonerations (the "Registry") collects, analyzes and disseminates information about exonerations in the United States since 1989. As defined by the Registry, "an exoneration occurs when a person who has been convicted of a crime is officially cleared based on new evidence of innocence."³ The purpose of this work is to study the causes of

³ See <https://www.law.umich.edu/special/exoneration/Pages/glossary.aspx> for a full definition.

factual error in criminal adjudication by examining those cases in which the worst sort of error is detected after the fact: conviction of an innocent defendant.

The clearest lesson of the work of the Registry is that the great majority of wrongful convictions in the United States do not end in exoneration but remain unknown, undetected and uncorrected.⁴ Indeed, the Registry has found that there have been many more *exonerations* in the past 25 years than are generally known. The Registry has added 387 cases since its first report, covering cases through February 2012⁵; two-thirds of these additional cases are exonerations that occurred in prior years but that had received little or no attention.

As of this writing, the Registry has assembled data on 1,260 exonerations in the United States, by far the most extensive database of such cases ever created. Some of the patterns that are found in these data contradict common impressions about wrongful convictions and exonerations. Two important examples:

- In the popular media, “exoneration” is routinely paired with “DNA.” In fact, less than a third of all known exonerations in the United States since 1989 involve any DNA evidence (362/1,260). DNA played a role in less than a quarter of exonerations in murder cases (139/572), and in only about a fifth of exonerations of defendants who were sentenced to death (23/105).
- It is often said that the most common cause of wrongful convictions is mistaken eyewitness identification.⁶ In fact, among all known exonerations, the leading cause of

⁴ Samuel R. Gross & Michael Shaffer, *Exonerations in the United States, 1989-2012*, 3 (June 22, 2012), available at https://www.law.umich.edu/special/exoneration/Documents/exonerations_us_1989_2012_full_report.pdf.

⁵ Compare the 873 exonerations in Gross & Shaffer, *supra* n.4, and the 1,260 exonerations listed on www.exonerationregistry.org as of December 12, 2013.

⁶ See Edwin M. Borchard, *Convicting the Innocent*, xiii (Yale U. Press 1932); Brandon Garrett, *Convicting the Innocent*, 80 (Harvard U. Press 2011); The Innocence Project, *Eyewitness Misidentification*, <http://www.innocenceproject.org/understand/Eyewitness-Misidentification.php>.

the underlying wrongful conviction is a deliberate false accusation, usually perjury.⁷ (Eyewitness error is the most common cause of error among DNA exonerations, which overwhelmingly involve sexual assaults in which the main evidence against the innocent defendant was the eyewitness identification by the victim.)

II. Causal Factors in Capital Murder Exonerations, Generally, and in Mr. Manning's Case

1. The nature of the crime.

(i) Capital murder. Mr. Manning was convicted of capital murder, and sentenced to death.

Nearly half of all known exonerations in the United States are murder cases (572/1,260), despite the fact that murder convictions account for 0.6% of felony convictions.⁸ Capital murder convictions are even more dramatically over-represented among exonerations. The Registry includes 105 exonerations of defendants who were sentenced to death, more than 8% of the total (105/1,260), even though death sentences amount to about 0.085% of all prison sentences in the United States.⁹ In other words, death sentences are about 100 times more likely to end in exoneration than prison sentences in the United States.

This issue is discussed briefly at the end of the Argument.

(ii) Female victims. Only about 23% of murder victims in the United States are female,¹⁰ but nearly half of the murder exonerations include one or more female victims (275/572). It is not apparent why murders of women are more likely to show up as cases in which innocent

⁷ Gross & Shaffer, *supra* n.4, at 40; The National Registry of Exonerations, *UPDATE: 2012*, 17 (Apr. 3, 2013), available at https://www.law.umich.edu/special/exoneration/Documents/NRE2012UPDATE_4_1_13_FINAL.pdf.

⁸ Sean Rosenmerkel, *et al.*, Bureau of Justice Statistics, *Felony Sentences in State Courts, 2006-Statistical Tables*, 3 (Revised November 22, 2010), available at <http://www.bjs.gov/content/pub/pdf/fssc06st.pdf>.

⁹ Samuel R. Gross & Barbara O'Brien, *Frequency and Predictors of False Conviction: Why We Know So Little, and New Data on Capital Cases*, 5 J. OF EMPIRICAL LEGAL STUD. 927, 947 n.46 (2008).

¹⁰ U.S. Department of Justice, Federal Bureau of Investigations, *Uniform Crime Report: Crime in the United States, 2010*, available at <http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2010/crime-in-the-u.s.-2010/offenses-known-to-law-enforcement/expanded/expandedhomicidemain.pdf>.

defendants were convicted and then exonerated, but it is sizeable effect. Mr. Manning was convicted of murdering two women.

2. *The length of the investigation*

In a study published in 2008, Professors Samuel Gross and Barbara O'Brien compared exonerations of defendants who had been sentenced to death in the United States from 1973 through 2003 to a random sample of executions in the same period.¹¹ On the assumption that virtually all of those who were executed were in fact guilty, this comparison enabled the researchers to determine how exonerated capital defendants differed from those who committed the crime for which they were sentenced to death.

The strongest finding concerned the length of the investigation that led to charging the defendant: "[L]ong, frustrating searches [for the killers] pose a higher risk of wrongful conviction." In particular, capital murder investigations lasting more than a year are disproportionately common among exonerations. "[C]ompared to executions, nearly twice as many of the investigations leading to exonerations lasted over a month," but "more than three times as many lasted over a year, 13 percent versus 4 percent."¹²

¹¹ Gross & O'Brien, *supra* n.9.

¹² *Id.* The full comparison is reflected in the following table, *id.* at 957:

Table 6: Executions and Capital Exonerations in the United States 1973 - 2003,

Time from Crime to Arrest	<i>Executio ns</i> (132)	<i>Exonerati ons</i> (91)
0 – 10 Days	64%	36%
11 – 30 days	14%	22%
31 – 120 days	11%	17%
121 – 365 days	7%	12%
More than 365 days	4%	13%
TOTAL	100%	100%

The investigation in Mr. Manning's case lasted more than 18 months, from the crime to his indictment.

3. Contributing factors in capital murder exonerations

(i) Perjury and other false accusations. As mentioned above, the wide-spread belief that eyewitness misidentification is the most common cause of wrongful convictions is false. That distinction belongs to deliberate false accusations, usually in the form of perjury, which occur in 55% of the exonerations in the Registry (703/1,260), compared to 38% with mistaken eyewitness identifications (479/1,260). Perjury and other false accusations are even more common among murder exonerations – they occurred in 65% of the cases (376/572) – and more common yet among exonerations of defendants who were sentenced to death, 72% (76/105).

In Mr. Manning's case, the only witness who claimed to see him near the scene of the crime committed perjury. Kevin Lucious has recanted his testimony entirely; his recantation is corroborated by independent sworn and documentary evidence that, contrary to his testimony, he did not live near the victims at the time of the murder. Additionally, while there is no direct evidence that Herbert Ashford also lied under oath when he testified that he received no favorable treatment, the record is clear that he repeatedly asked state authorities to help reduce his federal prison sentence, and that sentence was in fact reduced a few months before Mr. Manning's trial.

(ii) Official misconduct. Official misconduct is the third most common cause of error among known exonerations, after false accusations and eyewitness errors. It occurred in 45% of all exonerations (562/1,260), but the great majority of those cases are murders. Official misconduct is the second leading causal factor among murder exonerations, occurring in 59% of the cases (338/572), and more common still among capital murder exonerations: 69% (72/105).

There are many types of official misconduct in the cases, but the most common serious form of official misconduct is the failure to disclose exculpatory evidence to the defendant and the court.¹³ In Mr. Manning's case, it appears that the state has done this in at least two instances. (1) The state did not disclose to the defendant or the court that the bloody shoe print retrieved from the scene of the crime came from a shoe so small that Mr. Manning could not possibly have worn it. (2) The state also did not disclose police notes that indicated that at the time of the crime Mr. Lucious did not live near the victims' house and could not have seen the defendant enter their home.

4. Recantations by witnesses against the defendant

The Registry is conducting a study of the role of recantations in exonerations. A preliminary report was released in May of this year,¹⁴ but as research continues additional recantations are coming to light in cases in which recantations had not previously been identified. Overall, a quarter of known murder exonerations include recantations from state witnesses, mostly by witnesses who testified that they saw the crime or events surrounding the crime, or that the defendant admitted his guilt to them. Seventy-three percent of the murder exonerations with recantations also included official misconduct, and 91% also included perjury or other false accusations.

Once again, Mr. Manning's case fits a common pattern among murder exonerations. As mentioned above, the chief witness against him, Kevin Lucious, has recanted his testimony – a

¹³ Gross & Shaffer, *supra* n.4 at 66. Under *Kyles v. Whitley*, 514 U.S.491 (1995), it is a violation of the Constitution to fail to disclose material exculpatory evidence in the possession of the state even if the evidence is not known to the prosecutor and the failure to disclose is unintentional.

¹⁴ Alexandra E. Gross & Samuel R. Gross, *Witness Recantation Study: Preliminary Findings* (May, 2013) available at https://www.law.umich.edu/special/exoneration/Documents/RecantationUpdate_5_2013.pdf.

recantation that is confirmed by independent evidence – and the trial was marred both by perjury and by official misconduct.

5. The high risk of error in difficult capital murder investigations

Thus far, *amicus* has presented data and factual information from research on wrongful convictions and exonerations. This research indicates that capital murder prosecutions present an unusually high risk of erroneous conviction. But why? There are no specific data that answer that question, but there are reasonable explanations for this troubling pattern.¹⁵

Police and prosecutors devote far more resources to murder than to lesser crimes. As a result, they often identify and prosecute murder suspects after difficult investigations that would not be pursued for robberies, let alone auto thefts. This intense focus on murder serves a highly important goal: it increases in the number of accurate murder convictions, as reflected in a higher clearance rate for murder (about 62%) compared to other crimes of violence (rape, 40%; robbery, 28%) or property crimes (19%).¹⁶ But the same intense focus may also increase the number of wrongful murder convictions. Homicide investigations are often difficult because, by definition, the victims are unavailable; nonetheless, cases that would otherwise have been abandoned are brought to trial *because* someone has been killed – which means that the authorities pursue murder prosecutions when the evidence is marginal and the risk of error is substantial; the extraordinary emotional and practical pressures to secure convictions for heinous crimes tempt police officers and prosecutors to cut corners; and everyone involved—the police, the

¹⁵ See Samuel R. Gross, *Convicting the Innocent*, 4 ANNUAL REV. OF LAW AND SOCIAL SCIENCE 173, 178-79 (2008).

¹⁶ U.S. Department of Justice, Federal Bureau of Investigation, *Crime in the United States 2012*, <http://www.fbi.gov/about-us/cjis/ucr/crime-in-the-u.s/2012/crime-in-the-u.s.-2012/offenses-known-to-law-enforcement/clearances>.

prosecutors, the jurors, the judge—is reluctant to release a defendant who seems likely to have committed a vicious murder even if the evidence of guilt is open to doubt.

These pressures apply to all murder cases, but especially to highly disturbing capital murders such as the killings of Alberta Jordan and Emmoline Jimmerson, and even more so when “the investigation of the crime was unusually difficult,”¹⁷ as it was in Mr. Manning’s case.

CONCLUSION

The investigation and trial in Mr. Manning’s case are similar in several important respects to the investigations and trials of many other defendants who were convicted of murder and sentenced to death in the United States, but who were exonerated and released years later after new evidence of their innocence emerged. Most if not all of the evidence against Mr. Manning is of the sort that has led to the conviction of many innocent capital defendants.

Amicus curiae respectfully submits that this disturbing pattern might help inform the Court in assessing the prejudice that may have flowed from the constitutional errors that are the subject of this appeal.

Respectfully Submitted,

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¹⁷ Gross & O’Brien, *supra* n.9, at 951.

CERTIFICATE OF SERVICE

I hereby certify that on this day I electronically filed the foregoing Brief of *Amicus Curiae* with the Clerk of the Court using the MEC System, which sent notification of such filing to the following:

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